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October 15, 2008

BY HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re Docket No. 42110, Seminole Electric
Cooperative, Inc. v. CSX Transportation, Inc.

Dear Secretary Quinlan:

Enclosed for filing in the referenced docket please find an original and 10 copies of the Reply of Complainant Seminole Electric Cooperative, Inc. to Defendant CSX Transportation, Inc.'s Petition to Stay Proceedings.

An additional copy of the Reply also is enclosed. Kindly indicate receipt and filing of this Reply by time-stamping this extra copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Christopher A. Mills

CAM:lad
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



SEMINOLE ELECTRIC COOPERATIVE, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. 42110

**COMPLAINANT'S REPLY IN OPPOSITION TO
DEFENDANT'S PETITION TO STAY PROCEEDINGS**

Complainant Seminole Electric Cooperative, Inc. ("SECI"), pursuant to 49 C.F.R. Part 1104.13, hereby replies in opposition to Defendant CSXT Transportation Inc 's ("CSXT") Petition to Stay Proceedings ("Petition"), which was filed in this docket on October 10, 2008. The stay requested by CSXT is contrary to the Board's rules governing proceedings such as this, and is both unnecessary and unwarranted. The Petition therefore should be denied.

PRELIMINARY STATEMENT

The Petition opens with a "Background" section that purports to describe the circumstances under which SECI and CSXT negotiated the 1998 contract for coal transportation service to SECI's electric generation facility at

Palatka, Florida which is set to expire at the end of this year,¹ and the unsuccessful negotiations over a possible extension of or successor to that contract which took place between SECI and CSXT over the two (2) years prior to the filing of SECI's Complaint. *See* Petition at 2-4. The source of these descriptions is a Verified Statement offered by CSXT Assistant Vice-President Michael P. Sullivan, which accompanied the Petition

Mr. Sullivan does not claim any first-hand knowledge with respect to the negotiations leading to the 1998 contract, and in fact, he did not participate in those negotiations. His statements regarding those negotiations are entitled to no weight and should be ignored. As part of its evidentiary submission on the issue of qualitative market dominance, SECI will present specific evidence, supported by testimony of witnesses with first-hand knowledge, both as to the actual facts surrounding the 1998 negotiations (to the extent they are relevant), and to the absence of effective competition for the transportation of SECI's utility coal requirements.

Mr. Sullivan also offers a shaded account of the parties' more recent, confidential negotiations. To respond specifically to Mr. Sullivan's characterizations, SECI would be required to disclose facts and information that both SECI and CSXT have agreed would be held in confidence, and not used for purposes other than their commercial negotiations. Attached to this Reply as Counsel's Exhibit No. 1, however, is a copy of the correspondence in which SECI

¹ *See* SECI's Verified Complaint, ¶6

advised CSXT of the commencement of this proceeding. While the letter does not contain any confidential information, it should suffice to demonstrate that CSXT's account is hardly an objective one.²

ARGUMENT

I. There Is No Basis for a Stay Pending Mediation

CSXT's first argument is that a stay should be granted in order to allow the parties to engage in mediation. Petition at 4-5. However, under the Board's rules governing proceedings under the stand-alone cost constraint of the *Coal Rate Guidelines*, mediation is automatic and mandatory in a case such as this. See 49 C.F.R. Part 1109.4 (a) - (e). Moreover, those same rules provide that absent special circumstances requiring a specific order from the Board, the procedural schedule (including discovery) is not to be held up during mediation. 49 C.F.R. Part 1109.4(f). This rule was adopted specifically in response to concerns expressed by shippers such as SECI, that rail rate proceedings not be delayed or suspended during Board-mandated mediation.³

CSXT offers nothing in the way of a justification for a stay pending mediation other than the belief that the parties might reach a commercial

² For example, while it should not be particularly consequential, CSXT states that "[a]t Seminole's request," CSXT made a contract proposal that linked rail rates to changes in the price of natural gas. See Petition at 4. In fact, SECI simply agreed to *consider* such a proposal, at CSXT's behest. See Counsel's Exhibit No. 1.

³ See Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, Decision served April 3, 2003, at 2-3.

settlement. Petition at 5. However, that is a possible outcome of *every* Board-sponsored mediation, indeed, it is one of the acknowledged goals of mediation itself. Obviously, such a hope cannot support departure from the general rule that SAC rate proceedings are not to be delayed during compulsory negotiations.⁴

II. SECI's Complaint is Procedurally and Jurisdictionally Sound

CSXT next concocts "procedural difficulties and jurisdictional problems" that it claims justify a stay. None of these claims has merit.

First, CSXT notes that SECI will not begin shipping coal under the challenged rates until January 1, 2009, then complains that "without a stay the parties would be on course to complete discovery by December 10 [2008]. . . ." Petition at 5. Even if relevant, CSXT's concern is unfounded. Concurrently herewith, Seminole is filing its Report on the parties' preliminary conference pursuant to 49 C F R Part 1111 10(b). The Report contains a proposed Procedural Schedule under which discovery would not be concluded until February 2, 2009 at the earliest.

In the same vein, CSXT's stated intent to publish a new tariff with presumably different rates for application to SECI's traffic on or about November 15 provides no justification for a stay. SECI's Complaint already applies to any

⁴ CSXT's optimism is interesting, given that the parties have attempted to reach agreement for at least two years without success, and Mr. Sullivan himself acknowledges CSXT's intent to dramatically increase SECI's coal transportation rates. See V S Sullivan at 2. Seminole also notes that the two rate cases cited at page 5 of the Petition that were resolved through mediation were not SAC rate cases, but "small" rate cases brought under the Board's simplified standards adopted in Ex Parte No. 646 (Sub-No. 1).

new or revised tariff (*id.* ¶19) and the level of the challenged CSXT rates⁵ has no bearing on either the determination of variable costs or the calculation of stand-alone costs and maximum reasonable rates. *See* Ex Parte No. 657 (Sub-No. 1), *Major Issues In Rail Rate Cases*, Decision served October 30, 2006 (movement-specific adjustments to URCS variable costs disallowed; percent reduction approach for allocating rate relief replaced with MMM approach so level of challenged rate does not influence outcome). Neither the nature and scope of the parties' discovery requests nor the substance of CSXT's Answer to the Complaint are likely to be affected by as-yet unpublished new tariff rates.⁶

Second, CSXT references SECI's pending Petition for Injunctive Relief, and argues that the Board's consideration of the factors relevant to such relief cannot proceed until CSXT establishes its new tariff rates. Petition at 6. CSXT never explains how this could justify the stay that it seeks, but the implications of its thesis are as bold as they are ill-founded. Apparently, CSXT believes that the stated *intent* to publish a new tariff – without more – is sufficient to arrest the progress of a proceeding initiated to consider the reasonableness of a

⁵ CSXT opines that once SECI sees the new tariff and associated rates, SECI "might re-evaluate its decision to pursue this litigation" Petition at 6. This is particularly disingenuous given that CSXT has held the power to establish rates that would have avoided this litigation for more than two years, and has failed to use it.

⁶ On information and belief, the terms of the new tariff may not even be appropriate for application to SECI's traffic. As reflected in Counsel's Exhibit No. 1, CSXT has indicated that it will establish rates that only apply to shipments in CSXT-supplied railcars, even though SECI's traffic has moved in private cars for over a decade – cars which SECI acquired to comply with obligations that both parties bargained for and that CSXT agreed would be used. *See* SECI Verified Complaint, ¶ 6.

tariff that already is in effect.⁷ Obviously, SECI cannot dictate the timing of the Board's consideration of SECI's Petition for Injunctive Relief, though SECI respectfully submits that it should be resolved before the end of the year. Neither, however, should CSXT be permitted to control the conduct of this proceeding merely by stating its intentions.

Finally, CSXT suggests that there may be a jurisdictional problem with SECI's Complaint by virtue of its having been filed nearly three (3) months prior to the start of common carrier service. Petition at 6-7. However, CSXT does not dispute that the rates challenged in the SECI Complaint are the common carrier rates that presently apply to the SECI coal movement, as CSXT previously confirmed in writing to SECI,⁸ and this case does not present a question whether or when CSXT might be *compelled* to establish common carrier rates for the Seminole coal movement.⁹ CSXT already has done so. Plainly, three months is "near the time"¹⁰ at which the SECI-CSXT contract will expire and common carrier shipments will begin. SECI's Complaint is ripe, and jurisdictionally sound.

⁷ It is also noteworthy that CSXT controls the issuance of all of its tariffs. Had it so chosen, it could have published its "Seminole-specific common carrier rates" weeks or even months ago.

⁸ See SECI's Verified Complaint, ¶9.

⁹ Compare *Burlington Northern R Co v Surface Transp Board*, 75 F 3d 685, 692-94 (D C Cir 1995).

¹⁰ *Central Power & Light Co v Southern Pac Transp Co*, 1 S T.B 1059, 1079 (1996). It is noteworthy the Board's observation was made in the context of a ruling that declined to force a railroad to establish common carrier rates *over one year* before they would be needed. That is not the case here.

See Docket No. 42095, Kansas City Power & Light Company v. Union Pacific Railroad Company, Decision served May 19, 2008 (adjudicating complaint filed on October 12, 2005, challenging published tariff rates that would not be used until January 1, 2006).

CONCLUSION

For all of the foregoing reasons, CSXT's Petition to Stay Proceedings should be denied.

Respectfully submitted,

SEMINOLE ELECTRIC COOPERATIVE,
INC.

Of Counsel

Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036
202.347 7170

Dated: October 15, 2008

By: Kelvin J. Dowd
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202.347.7170



Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2008, I served the foregoing Reply in Opposition to Defendant's Petition to Stay Proceedings upon defendant CSX Transportation, Inc by causing a copy thereof to be hand-delivered to its counsel, as follows:

G. Paul Moates, Esq.
Paul A. Hemmersbaugh, Esq.
Sidley Austin LLP
1201 K Street, N.W.
Washington, D.C 20005



Christopher A. Mills



October 3, 2008

Mr. Mike Bullock
CSX Transportation
500 Water Street - J842
Jacksonville, FL 32202

SUBJECT: CSXT Letter dated September 26, 2008

Dear Mike:

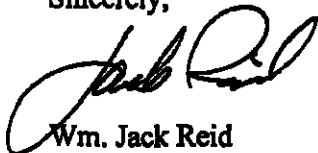
This responds to your letter of September 26. While your letter provides several mischaracterizations of our meeting, we see no benefit of belaboring them at this time.

As we indicated at our August 15 meeting, while we were willing to consider an alternative approach utilizing a natural gas price adjustment mechanism, any such proposal would necessarily have to be a significant improvement over your previous offer. As you must already realized, the resultant transportation rate for 2009 in your most recent proposal is expected to produce a substantially higher transportation rate than the rate produced by your reaffirmed June 2008 offer, which we previously advised was not acceptable. We know of no natural gas price forecaster that is suggesting prices would ever be low enough to create a situation where Attachment I prices were lower than Attachment II. Additionally, besides the natural gas price volatility risk we would assume in the Attachment I rates, your proposal creates a market lag with the use of an annual adjustment mechanism. Accordingly, neither the new alternative nor the CSXT reaffirmed offer is acceptable to Seminole and therefore please consider this our rejection of both. It is very clear that the parties have widely differing views on the coal transportation market and the STB rate review process.

Having no reasonable alternative, starting January 1, 2009, Seminole plans, and hereby advises, that it will begin taking service under your published tariff for unit train coal service in private equipment, which you previously confirmed is Tariff CSXT-8200-J. However, the rates set under that tariff are unreasonable and, in our view, exceed the applicable maximum rate levels under the STB's rules. Therefore, Seminole has filed a formal complaint with the STB, challenging the rates, rules and other terms for our service as outlined in the Tariff. The complaint is being served on CSXT in accordance with STB procedure, but a copy is enclosed for your information. Although we regret that we have been unable to reach an amicable resolution to this matter, we have taken this action to protect our members and their members from the excessive cost increases represented by your Tariff rates.

Finally, I note your reference to a new rate tariff that might be published and apply to shipments in CSXT-supplied equipment. Our movement has always been in shipper supplied railcars, and Seminole's current fleet was assembled specifically to comply with contract obligations to CSXT. Any CSXT move to strand this fleet can only be viewed as an attempt to punish Seminole for not accepting your offers and will be aggressively resisted.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jack Reid".

Wm. Jack Reid
Director of Fuel Supply

cc: T. Woodbury
M. Opalinski